



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 5, 1998

The Honorable Ron Lewis
Chair, County Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-015

Re: Application of exemption from competitive
bidding and competitive proposal requirements
for county contracts for work performed and paid
for by the day (RQ-979)

Dear Representative Lewis:

You have requested our opinion regarding the application of House Bill 2179,¹ which restricts the exemption from competitive bidding and competitive proposal requirements available for a county contract for work performed and paid for by the day.

The County Purchasing Act, sections 262.021 through 262.035 of the Local Government Code (the "act"), sets out the competitive bidding and competitive proposals procedures generally applicable to a county. The commissioners court of the county must comply with the act's procedures before purchasing² an item³ under a contract that will require an expenditure of fifteen thousand dollars or more. Local Gov't Code § 262.023(a).⁴ Section 262.024 exempts contracts for the purchase of certain items from these procedure, including a contract for the purchase of work performed and paid for by the day if the commissioners court grants the exemption.

¹Act of May 16, 1997, 75th Leg., R.S., ch. 442, § 2, 1997 Tex. Sess. Law Serv. 1719, 1719

²"Purchase" means any kind of acquisition, including a lease, of an item." Local Gov't Code § 262.022(6).

³"Item" means any service, equipment, good, or other tangible or intangible personal property, including insurance and high technology items." *Id.* § 262.022(5).

⁴The competitive bidding and competitive proposal requirements apply only to contracts which will be paid with current funds, bonds funds, or through time warrants. *Id.* § 262.023(b). Contracts that will be paid with the proceeds of certificates of obligation are governed by the competitive bid provisions of the Certificate of Obligation Act of 1971, subchapter C of chapter 271 of the Local Government Code. *Id.* Contracts that will be paid with proceed of tax anticipation notes are also subject to the competitive bid requirements of the Certificate of Obligation Act. Act of May 16, 1996, 75th Leg., R.S., ch. 442, § 1, 1997 Tex. Gen. Laws 1719, 1719 (now codified at Local Gov't Code § 262.023(b)).

Before the 1997 legislative session, section 262.024 provided in relevant part as follows:

(a) A contract for the purchase of any of the following items is exempt from the requirement established by Section 262.023 if the commissioners court by order grants the exemption:

....

(5) any work performed and paid for by the day, as the work progresses[.]

During the 1997 legislative session, you authored House Bill 2179, which, as introduced, added a new subsection (e) to section 262.024 limiting the application of subsection (a)(5) to counties with population of 100,000 or less. The House County Affairs Committee deleted subsection (e) from the bill and modified subsection (a)(5) as follows:

any *individual* work performed and paid for by the day, as the work progresses, *provided that no individual is compensated under this subsection for more than 20 working days in any three month period* [.]

Both houses passed House Bill 2179, with this amendment, and the governor signed it on May 29, 1997. House Bill 2179 became effective as of September 1, 1997.⁵

You do not ask us to address a specific question with respect to House Bill 2179. Based on correspondence attached to your request, however, we understand your request relates to actions taken by the Commissioners Court of Jefferson County prior to September 1, 1997, which the county asserts constitute prior contracts not subject to the limitations imposed by House Bill 2179. Apparently these contracts extend beyond September 1, 1997, and require individual compensation for more than twenty days in a three-month period. Although we can generally discuss the application of House Bill 2179 and section 262.024(a)(5) as it relates to the issues raised above, we cannot determine whether particular commissioners court actions constitute prior contracts for work performed and paid by the day.

We first consider House Bill 2179. Effective September 1, 1997, House Bill 2179 restricts the exemption from competitive bidding and proposal requirements available for any contract for individual work performed and paid for by the day as the work progresses by limiting payment to any individual for such work to twenty days in any three-month period.⁶ In other words, no

⁵See Act of May 16, 1997, 75th Leg., R.S., ch. 442, § 5, 1997 Tex. Sess. Law Serv. 1719, 1720.

⁶See Act of May 16, 1997, 75th Leg., R.S., ch. 442, § 2, 1997 Tex. Sess. Law Serv. 1719, 1719. House Comm. on County Affairs, Bill Analysis, H.B. 2179, 75th Leg. (1997) (Background) ("Closing the loophole in the law and (continued...)")

individual may be hired and paid under this exemption for more than twenty days in a three-month period.⁷ Thus, on or after September 1, 1997, a county commissioners court may not grant an exemption for a contract for any individual work performed and paid for by the day that if granted will exceed this limit. House Bill 2179 does not specifically indicate that the twenty-day limitation applies only to contracts awarded after September 1, 1997. It does not need to so specify. An amendment to a statute is presumed to apply prospectively unless expressly made to apply retrospectively.⁸ Nothing in the language of House Bill 2179 indicates that it was intended to apply retrospectively. In sum, House Bill 2179 does not apply to any contract awarded before September 1, 1997, under the former section 262.024(a)(5) exemption for work performed and paid for by the day. Therefore, the limitation that no individual may be compensated for more than twenty days in any three-month period would not apply to a contract for work performed and paid for by the day awarded by the Jefferson County Commissioners Court prior to September 1, 1997, under the former section 262.024(a)(5) exemption.

Whether the Jefferson County Commissioners Court contract awarded before September 1, 1997, but which extends beyond that date and into the future, is a contract for work performed and paid for by the day exempted under former section 262.024(a)(5) is a separate question. A contract for work performed and paid for by the day is by definition a contract for the day.⁹ The contract would be completed when the other party has worked for the day and the county had paid for such work. Additional work would be contracted for and paid, again on a daily basis, as needed, *as the work progresses*. We note, however, that few cases have construed the “work by day” exception and none in the recent past. One of these, *Ashby v. James*, 226 S.W. 732 (Tex. Civ. App.—Amarillo 1920, no writ), indicates the type of contract not covered by this exception. A contract is not one for work performed and paid for by the day as the work progresses simply because it is payable in daily installments. The *Ashby* court concluded that a county’s agreement to pay a per diem not to

⁶(...continued)

requiring counties to comply with competitive bidding when using anticipation notes and limiting work by the day will help to keep costs to a minimum and keep county residents informed); *id.* (Explanation of Amendments) (“Committee Amendment No. 1 [adding limiting language in section 262.024(a)(5)] limits the term for which day labor may be hired to 20 days every 3 months.”).

⁷*Id.*

⁸*See* Gov’t Code § 311.022 (statute presumed to be prospective in operation unless expressly made retrospective); *Russell v. Board of Trustees of Firemen, Policemen and Fire Alarm Operators’ Pension Fund of Dallas, Tex.*, 968 F.2d 489, 489 (5th Cir. 1992) (under Texas law, amendment to statute presumed not to apply retroactively).

⁹*Cf.* 35 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 18.20 (Texas Practice 1989) (“Thus, if the county is under no fixed obligation to pay a specified amount but may cancel labor or services at any time, competitive bids are not required.”).

exceed \$13,000 to a construction company to manage and supervise construction of a courthouse did not fall within the exception. *Ashby*, 226 S.W. at 737.¹⁰ The court stated that the contract was

none the less a contract for \$13,000, for the entire services to be performed in superintending the work, whether the time be short or long. . . . It is not to pay for work by the day, but an agreement to pay for the entire services be it one day or a thousand. The installment plan does not affect the essential purpose of the contract. . . .

. . . . It is an agreement to pay \$13,000, creating a present debt for all future services to be performed as an entire undertaking.

*Id.*¹¹

Under *Ashby*, an agreement that creates a present obligation to pay for performance of all future services, is not a contract for work performed and paid for by the day notwithstanding payment on a daily basis. *Id.* From this we can conclude that a contract that obligates a county to pay for all future services for an undertaking is not a contract for work performed and paid for by the day. Nor is a contract that obligates a county to pay for all day labor supplied to do the work for the particular project. Consequently, if the Jefferson County contract obligates the county to pay for all future work or for all day labor supplied to do the future work for a given project, it is not a contract for work performed and paid by the day notwithstanding payment on a daily basis.

We cannot, however, determine whether particular actions taken by the Jefferson County Commissioners Court constitute contracts for work performed and paid for by the day exempted under former section 262.024(a)(5). This question requires us, first, to determine if there are contracts and secondly, if there are, whether they are valid contracts for work performed and paid by the day. We are not provided with any information with respect to or copies of the commissioners court proceedings evidencing the creation or award of the contracts in question. We do not know if the county has attempted to bind itself contractually to pay for performance of all work for a period extending beyond September 1, 1997, and into the future, but assuming that to be the case,

¹⁰The statute at issue in *Ashby* required a commissioners court to submit a contract for the expenditure or payment of \$2,000 or more to competitive bidding unless the contract was for work done under the direct supervision of the commissioners court and paid for by the day. *Ashby*, 226 S.W. at 736, 737. See also Attorney General Opinion JM-890 (1988) at 2 ("Prior to the codification of the 'personal or professional service' exception in 1931, the competitive bidding statute provided the sole statutory exception to its operation for 'work done under the direct supervision of the county commissioners and paid for by the day.'").

¹¹The court also noted that the contract at issue employed the contractor to supervise the work to be done and relieved the court of direct supervision and was therefore outside the statutory exception. *Ashby*, 226 S.W. at 737. See *supra* note 8.

this office does not construe contracts.¹⁰ Nor does it review particular contracts and determine whether they satisfy specific statutory requirements.¹¹

S U M M A R Y

House Bill 2179, Act of May 16, 1997, 75th Leg., R.S., ch. 442, § 2, 1997 Tex. Sess. Law Serv. 1719, 1719, restricting the exemption from competitive bidding and competitive proposal requirements for county contracts for work performed and paid for by the day does not apply to a contract for work performed and paid for by the day awarded prior to September 1, 1997. A contract for work performed and paid for by the day is a contract only for the day. A contract that obligates a county to pay for all future work, or for a party to provide day labor to do the future work, on a project, is not a contract for work performed and paid by the day notwithstanding payment on a daily basis.

Yours very truly,



Sheela Rai
Assistant Attorney General
Opinion Committee

¹⁰See, e.g., Attorney General Opinions DM-383 (1996) at 2 (interpretation of contract not appropriate function for opinion process), DM-192 (1992) at 10 ("This office, in the exercise of its authority to issue legal opinions, does not construe contracts.").

¹¹See Attorney General Opinions DM-383 (1996) at 2, DM-138 (1992) at 3 ("It is beyond the purview of the opinion process to review particular contracts and to determine whether they satisfy specific statutory requirements.").